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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY MELVIN, JR.,

Defendant and Appellant.

G051362

(Super. Ct. No. 05NF4024)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Jonathan S. Fish, Judge. Affirmed.

Rex Adam Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Gregory Melvin, Jr., appeals from the denial of his petition to redesignate two felony convictions as misdemeanors pursuant to Penal Code section 1170.18¹ — enacted as part of Proposition 47, an initiative passed by the voters in November 2014.

In 2006, defendant pleaded guilty to a felony violation of section 496d, subdivision (a) (knowingly obtaining stolen vehicle; count 1), and a felony violation of Vehicle Code section 10851, subdivision (a) (vehicle taking; count 2). As a factual basis for the plea, defendant stated, “I willfully & unlawfully drove a motor vehicle of another [without] the consent of the owner and possessed a vehicle knowing it to be stolen.” The court stayed imposition of sentence on count 1, and sentenced defendant to two years in state prison on count 2. In 2014 defendant filed an petition pursuant to section 1170.18, subdivision (f), to redesignate his felonies as misdemeanors. The court denied the petition “because of the automobile aspect.” Defendant appealed, contending that automobile theft falls within the scope of section 1170.18.

This issue has generated conflicting opinions in the Court of Appeal, and it is currently before the California Supreme Court. We need not address it, however, because even assuming automobile theft can be treated as petty theft pursuant to section 490.2, subdivision (a), if the value of the vehicle is \$950 or less, defendant failed to produce evidence of the value of the vehicle, and thus failed to demonstrate his eligibility for relief under section 1170.18, subdivision (f).

DISCUSSION

Section 490.2 was enacted pursuant to Proposition 47. Subdivision (a) states, “Notwithstanding Section 487 or any other provision of law defining grand theft,

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All statutory references are to the Penal Code unless otherwise stated.

obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor,” with some exceptions not relevant here. This statute is particularly important in the context of section 1170.18, where a defendant’s ability to convert a prior felony into a misdemeanor depends on whether the defendant “would have been guilty of a misdemeanor under the act that added this section (‘this act’) had this act been in effect at the time of the offense” (§ 1170.18, subd. (a).) Proposition 47 did not amend section 496d or Vehicle Code section 10851, both of which continue, at least on their face, to be punishable as felonies.

The courts have struggled with the question whether the catch-all provision of section 490.2 renders vehicle thefts misdemeanors if the vehicle is valued at less than \$950. In *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793, the court reasoned that Vehicle Code section 10851 is not a theft statute and is thus unaffected by section 490.2. To similar effect was *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted March 9, 2016, S232250. In *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted March 16, 2016, S232344, the court reached the opposite conclusion, reasoning that some violations of Vehicle Code section 10851 constitute theft convictions and thus fall within the ambit of section 490.2.

We need not address this issue, however, because, even assuming vehicle theft falls within the ambit of section 490.2, defendant failed to demonstrate his eligibility for relief under section 1170.18 because he failed to present any evidence that the vehicle in question was valued at \$950 or less.

The burden of proof for establishing eligibility for relief under section 1170.18 is on the petitioner. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880 (*Sherow*).) In *Sherow*, the petitioner, who had been convicted of second degree burglary, sought to be resentenced pursuant to section 1170.18, subdivision (a), but provided no evidence in conjunction with his petition, and there was nothing in the record indicating

the value of the property he stole. (*Id.* at p. 877.) In concluding the burden was on the petitioner, the court noted that a popular treatise placed the burden on the petitioner, and that, ordinarily, ““[a] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.”“ (*Id.* at 879.) Addressing the due process aspect of placing the burden on the petitioner, the court reasoned, “We think it is entirely appropriate to allocate the initial burden of proof to the petitioner to establish the facts, upon which his or her eligibility is based. [¶] Applying the burden to [defendant] would not be unfair or unreasonable. He knows what kind of items he took from the stores in counts 1 and 2. At the time of trial it was not necessary for the prosecution to prove the value of the loss to prove second degree burglary. Thus there is apparently no record of value in the trial record. [¶]

A proper petition could certainly contain at least [defendant’s] testimony about the nature of the items taken. If he made the initial showing the court can take such action as appropriate to grant the petition or permit further factual determination.” (*Id.* at p. 880.)

We agree with the analysis in *Sherow*, and we note further support for that holding can be found in section 1170.18, subdivision (g), which states, “If *the application* satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.” (Italics added.) Although section 1170.18 does not explicitly allocate the burden of proof, requiring that “the application” satisfy the appropriate criteria strongly suggests the burden is on the petitioner.

Applying these principles here, defendant’s petition contained no evidence of the value of the vehicle stolen, nor does the record on appeal indicate even the type of the vehicle, much less its value at the time of the offense. Accordingly, defendant failed to demonstrate his eligibility for relief under section 1170.18. In *Sherow* the court affirmed the denial of defendant’s petition “without prejudice to subsequent consideration of a properly filed petition.” (*Sherow, supra*, 239 Cal.App.4th at p. 881.) We will do the same.

DISPOSITION

The order is affirmed without prejudice to subsequent consideration of a properly filed petition.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.